UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

NATHAN KATZ REALTY, L.L.C. et al.
A Single Employer[1]

and

SIMA APARTMENT CORP.
Joint Employer[2]

and

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO
Petitioner

Case No. 29-RC-9265

and

FACTORY AND BUILDING EMPLOYEES UNION, LOCAL 187
Intervenor[3]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Joanna Piepgrass, a Hearing Officer of the National Labor Relations Board, herein called the Board.

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1 The Employer's name appears as amended at the hearing, including an additional 29 company names which are listed in Appendix A attached hereto. As discussed in more detail below, I find the real estate management agency of Nathan Katz Realty LLC, along with the 29 Katz family-companies which own the real estate properties in question, to be a single employer.

2 As described in more detail below, I find SIMA Apartment Corp. and Nathan Katz Realty LLC to be joint employers of the employees at the cooperative apartment building at 83-30 118th Street.

3 Local 187 intervened in this case, based on its collective bargaining agreements covering some of the Employer's employees, as described in more detail below.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[4] in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed. Specifically, I affirm the Hearing Officer's ruling regarding an adjournment request, and explain my denial of a special appeal regarding the adjournment request.

The petition in this case was filed on May 20, 1999,[5] by Local 32B-32J, Service Employees International Union, AFL-CIO, herein called the Petitioner, seeking to represent building service employees employed by Nathan Katz Realty LLC at approximately 30 different apartment buildings in Queens, New York. A hearing was initially scheduled for May 28, but was subsequently rescheduled for June 4. On Thursday, June 3 (the day before the scheduled hearing), the Region was notified that the Factory and Building Employees Union, Local 187, herein called the Intervenor, might have an interest in this matter, and notified the Intervenor of the hearing. That same day (June 3), the Intervenor filed a request to postpone the hearing until Wednesday, June 9, on the grounds that it did not have adequate time to prepare for the hearing. A postponement was granted, albeit only until Monday, June 7. The Intervenor retained counsel over the weekend. On the first day of hearing, all parties appeared, including the Intervenor. At that time, the Intervenor's formal motion to intervene was granted, based

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4 The undersigned Regional Director hereby amends the record sua sponte, as indicated in Appendix B attached hereto. References to the record will hereinafter be abbreviated as follows: "Tr. #" refers to transcript page numbers, "Bd. Ex. #" refers to Board exhibit numbers, "Pet. Ex. #" refers to Petitioner's exhibit numbers, and "Int. Ex. #" refers to Intervenor's exhibit numbers.

5 All dates hereinafter are in 1999, unless otherwise indicated.

on its 1998-2001 collective bargaining agreements with Nathan Katz Realty LLC at three of the buildings in question (Int. Ex.s 1, 2 and 3). The Intervenor took the position that these agreements constitute a bar to an election. The Intervenor's attorney also took positions on some other issues herein (e.g., that the building superintendents are not supervisors as defined in Section 2(11) of the Act), although he complained that he had not had adequate time to ascertain the facts.

During the hearing that day (Monday, June 7), the Intervenor moved for a one-week adjournment (until Monday, June 14), but the Hearing Officer denied the motion. The Intervenor and Nathan Katz Realty then filed with the undersigned Regional Director a request for special permission to appeal the Hearing Officer's ruling (Bd. Ex. 4). Permission was denied, and the parties were instructed that the hearing would resume the next day, on Tuesday, June 8. The Intervenor's attorney stated that he would "make every attempt" to be present the next day, but that he had to conduct a deposition in the afternoon. The Intervenor did not in fact appear for the second and last day of hearing on June 8. Three days later, on June 11, the Intervenor filed a post-hearing letter brief wherein it reiterated its position on the contract-bar issue, renewed its objections to the scheduling of the hearing, and requested an opportunity to review the transcript "to determine whether a request to re-open the hearing is appropriate." The Intervenor's letter (written more than a week after it was initially notified of this matter) did not indicate any additional issues it wanted to raise, nor any specific evidence it wanted to submit.

This Agency has an affirmative duty to avoid unnecessary delay and to resolve representation cases as expeditiously as possible, while also providing the parties an

adequate opportunity to present their positions and evidence on relevant issues. Bennett Industries, Inc., 313 NLRB 1363 (1994). In the instant case, the Intervenor initially did not receive adequate advance notice of the June 4 hearing date. For that reason, a postponement was granted until June 7.[6] From the time the Intervenor was first notified of this matter on June 3, to the commencement of the hearing on June 7, the Intervenor had four days to obtain counsel and explore the issues and facts. On June 7, the Intervenor had a full opportunity to present its position and evidence on the contract-bar issue and other issues.

For reasons discussed more fully below, I find that the Intervenor's three contracts, each of which covers a single employee, do not bar an election herein, inasmuch as they do not cover appropriate bargaining units.[7] No additional evidence regarding the contract-bar issue, which the Intervenor could theoretically have presented if it had been given more time, would have changed this result. Furthermore, on the supervisory issue, since I ultimately agree with the Intervenor's claim that the building superintendents are not statutory supervisors, the Intervenor has not been prejudiced by any lack of opportunity to present additional evidence on that issue. Finally, the Intervenor has not presented any other specific issues or evidence that it would have submitted if it had been given more time. In short, there is simply no basis to have prolonged the proceedings unnecessarily, or to consider reopening the record at this time. Accordingly, I affirm the Hearing Officer's denial of the request for a further postponement of the hearing.

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6 Incidentally, this was the second postponement in the case.

2. As indicated above, the Petitioner seeks to represent building service employees at approximately 30 different apartment buildings in Queens, New York, which are managed by Nathan Katz Realty LLC. With the exception of one building (owned by SIMA Apartment Corp.), all of the buildings are owned by various companies of which members of the Katz family are principals or shareholders. SIMA Apartment Corporation (which was represented by its own attorney at the hearing) owns a cooperative apartment building, of which the Katz family owns most, but not all, shares. The parties have raised various issues regarding the relationship of these entities as possible joint employers or single employers. Specifically, the Petitioner asserts that Nathan Katz Realty LLC and all the Katz-family companies are a single employer, whereas Nathan Katz Realty claims to be the sole employer of the petitioned-for employees. Furthermore, the Petitioner claims that SIMA Apartment Corporation is also part of the single-employer relationship. However, both Nathan Katz Realty and SIMA Apartment Corporation contend that they are joint employers, not a single employer, of the employees at the SIMA building.[8]

Nathan Katz Realty LLC and the buildings owned by Katz-family companies

The following information is based on the parties' factual stipulations and on the testimony of a Nathan Katz Realty property manager, Marcin Ceglinski. The facts are essentially undisputed.

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[7] Roman Catholic Orphan Asylum of San Francisco, 229 NLRB 251 (1977)(single-employee unit not appropriate); Appalachian Shale Products Co., 121 NLRB 1160 (1958)(contract must cover an appropriate unit to serve as a bar).

[8] A related issue, discussed in more detail below, involves the scope of the bargaining unit or unit(s). The Petitioner seeks to represent a large bargaining unit of all building service employees in buildings managed by Nathan Katz Realty LLC, including the SIMA Apartment Corporation, as a single employer. By contrast, Nathan Katz Realty and SIMA claim that they are only joint employers, and they do not consent to including employees at the SIMA building in an overall unit with other buildings.

The record indicates that Nathan Katz Realty LLC is a New York limited liability company with its principal office and place of business at 41-33 75th Street, Elmhurst, New York, engaged in managing various residential apartment buildings in the Borough of Queens. Nathan Katz and his wife, Sima Katz, are the principals of Nathan Katz Realty. Its chief operating officer is their son-in-law, David Levy,[9] who is married to their daughter Rita Katz Levy. The parties stipulated that all of the apartment buildings involved herein (listed in Appendix A) are owned by limited liability companies or corporations, of which the principals or stockholders are Nathan Katz, Sima Katz, their daughters Miriam Katz and Rita Katz Levy, or some combination thereof.

The superintendents and porters who repair and clean these buildings are paid on the Nathan Katz Realty payroll. They are supervised by Nathan Katz Realty supervisors, including property managers Marcin Ceglinski and Marvin Katz, who in turn report to David Levy. As part of their compensation, the superintendents and porters are allowed to live in an apartment in the buildings where they work, without paying rent. There are also maintenance craft employees, such as painters, plumbers, carpenters who are paid by Nathan Katz Realty to work in various buildings, as needed. They are supervised by painting supervisor Felix Castro and craft foreman Robert Radzipagic,[10] who also report to David Levy.

It appears that control of labor relations is centralized in the Nathan Katz Realty office. For example, Ceglinski testified that David Levy must approve all hiring and firing of employees. When new employees are hired, Levy also determines their wage

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9 The parties stipulated that Levy is a managerial employee.

10 The parties stipulated that Castro and Radzipagic are statutory supervisors.

rate. Levy was the person who signed the collective bargaining agreements with the Intervenor, covering three of the buildings. One of those agreements (Int. Ex. 3, covering the 43-08 40th Street building) listed the employer as "Rita Realty Company C/O Nathan Katz Realty Co."[11] Furthermore, both Nathan Katz (the individual) and David Levy signed a notice that was sent to "all superintendents and porters" regarding a meeting to discuss their benefits and wages (Pet. Ex. 1). According to Ceglinski, all employees at the various buildings are eligible for the same benefits, such as vacation time, medical insurance, and a 401(k) pension plan.

As stated above, Nathan Katz Realty provides these building-management services to the Katz-family-owned companies, which in turn own the buildings. The record does not contain any evidence regarding the financial arrangements between the managing agent and the individual buildings. However, the record indicates that there are no written contracts between Nathan Katz Realty and the buildings' owners. There is no evidence that Nathan Katz Realty manages any properties which are <u>not</u> owned by Katz-family companies or, conversely, that any of the Katz-family buildings are managed by a managing agent other than Nathan Katz Realty.

Under these circumstances, I find that Nathan Katz Realty LLC and the Katz-family companies listed in Appendix A constitute a single employer. The record clearly indicates common ownership of all these entities by immediate members of Nathan Katz's family, a common business purpose, a highly integrated operation of real estate ownership and management, common supervision and centralized control of labor

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11 Actually, according to the Employer's attorney, the owner of the 43-08 40th Street building is RKL Realty LLC. The initials "RKL" appear to be those of Rita Katz Levy.

relations. Furthermore, employees on the Nathan Katz Realty payroll are allowed to live rent-free in apartments owned by the separate building-owning companies as part of their compensation. This fact, along with the lack of written contracts between Nathan Katz Realty and the building-owning companies, suggests an absence of "arms-length" transactions between the entities. *See* Alexander Bistritzky, 323 NLRB 524 (1997)(real estate manager and buildings owned by manager and his immediate family with, among other things, common control of labor relations, found to be single employer).

SIMA Apartment Corp. and Nathan Katz Realty LLC

The parties stipulated that SIMA Apartment Corporation (hereinafter called SIMA) is a New York corporation which owns a cooperative apartment building at 83-30 118th Street in Kew Gardens, Queens. One superintendent and one porter are employed at the SIMA building. The parties dispute whether SIMA and Nathan Katz Realty are joint employers, or a single employer, of those two employees.

The following information is based on the testimony of SIMA's Board president, Edward Bruckstein, and that of Ceglinski, who is Nathan Katz Realty's property manager for the SIMA building and 14 other buildings.

Bruckstein testified that the building at 83-30 118th Street has 112 apartment units. It used to be owned entirely by Nathan Katz or his family, but then became a cooperative building 12 years ago. Approximately 70% of the apartments are still owned by the Katz family, but the remaining apartment shares are owned by other individuals such as Bruckstein. Bruckstein is not related to the Katz family.

SIMA Apartment Corporation has a five-member Board of Directors, elected annually by the apartment owners. Bruckstein has been the Board President for six or

seven years. He testified that the building sponsor[12] controls only two of the five seats on the Board.

Nathan Katz Realty LLC is the managing agent for the SIMA building. Although there is no written contract between the two entities, SIMA pays a monthly fee to Nathan Katz Realty for its services, plus reimbursement for certain out-of-pocket expenses. Approximately six or seven years ago, after Nathan Katz Realty requested an increase in its monthly fee, the Board voted to increase the fee.

There appears to be no dispute that, as managing agent, Nathan Katz Realty oversees the day-to-day operations of the superintendent and porter at the SIMA building. For example, Bruckstein testified that the managing agent schedules the employees, approves their vacation requests, and is notified when employees are out sick. If an employee is planning a long absence (i.e., a two-week vacation, rather than 1 or 2 days out sick), the managing agent may send a replacement to help out.

Unlike the superintendents and porters described above in the Katz-owned buildings, who were paid on Nathan Katz Realty's payroll, the superintendent and porter employed at the SIMA building are paid on the SIMA Apartment Corporation payroll. According to Bruckstein, the SIMA Board is involved in making decisions regarding their employment status. For example, he stated that the employees' wages cannot be increased without the Board's approval.

Bruckstein also stated that the Board is involved in hiring decisions, but the specific examples were not clear from the record. Specifically, he stated that the Board

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12 Bruckstein testified that "Nathan Katz" and SIMA are the building sponsors. It is not clear whether he was referring to Nathan Katz as an individual, or some other entity owned by Nathan Katz and/or his family.

decided at its last meeting in November or December 1998 to hire the building superintendent's wife (Andrew Mizerkowitz's wife, Helen Mizerkowitz) as a porter, and that she was recently replaced with another porter. However, when questioned by the Petitioner on cross-examination whether Andrew Mizerkowitz specifically discussed with Bruckstein (as Board president) the replacement of Mizerkowitz's wife as porter, Bruckstein said no, that "there was an agreement six months ago when she was hired that this was a temporary position." There was no explanation of how this agreement came about. Another witness, Nathan Katz Realty property manager Ceglinski, testified that that he interviewed Mizerkowitz's son for the porter position on June 5, and that the son began employment as porter on June 7. Ceglinski vaguely stated that this hiring "was discussed before" by the managing agent and the Board. However, it was not clear from the record whether the Board had specifically authorized the hiring of Mizerkowitz's son six months in advance, at its last meeting in late 1998; if so, why Ceglinski had to interview the son in June, 1999; and, if not, how the son could have been hired in June without the Board's prior approval. Similarly, SIMA's role in hiring a prior porter, Alvin (last name unknown) in 1998 was not clear from the record.

Bruckstein also testified that the SIMA Board may vote to discharge an employee, as may be recommended by Nathan Katz Realty. As an example, Bruckstein testified that Nathan Katz Realty recommended terminating an employee five years ago, although the employee ended up quitting his job before the Board had a chance to vote on the matter.

Ceglinski testified that the SIMA employees are subject to a different vacation policy than the Nathan Katz Realty employees he supervises at other buildings. There is no record evidence showing how SIMA's vacation policy was established.

In its post-hearing brief, the Petitioner disputes the SIMA Board's role in determining the employees' terms of employment by alleging that Nathan Katz Realty unilaterally implemented certain employee benefits and wage increases in early June, without the Board's prior approval. The record evidence on this point is somewhat fragmentary. Initially, Board president Bruckstein testified, in response to a question by the Hearing Officer, that the SIMA superintendent and porter have no health care plan (Tr. 53). Bruckstein also stated, in response to a question from the Petitioner on cross-examination, that there had been no decision at the Board's last meeting in late 1998 to give the superintendent a medical plan. Bruckstein specifically said "there was not a decision," although he also vaguely added "the topic of the super's wage and benefits is pretty much an issue at every Board meeting" (Tr. 46). Later in the hearing, while cross-examining property manager Ceglinski, the Petitioner introduced a copy of a memo from Nathan Katz Realty to "all superintendents and porters" announcing a meeting on May 25 to discuss benefits and wages (Pet. Ex. 1). It is not clear from the record whether the SIMA employees received this memo.[13] In any event, Ceglinski went on to testify that employees were offered a medical plan and 401(k) pension plan in late May, and that he

13 When Ceglinski was asked whether he was aware of a memo sent to "all the porters and superintendents," he answered affirmatively (Tr. 140). However, it was not clear whether this included the SIMA building as well as the 14 other buildings he manages for Nathan Katz Realty. After Ceglinski testified at length about the benefits and policies applicable to "all buildings" (Tr. 140-3), both Nathan Katz Realty's attorney and the Hearing Officer asked whether this included the SIMA building (Tr. 143). At that point, Ceglinski clarified: "To my knowledge, regarding the health benefit package and the 401(k) [for SIMA], I believe it's the same as other buildings. Regarding the vacations, I believe it's different" (Tr.

believed this included SIMA employees (Tr. 143). Thus, although it is not entirely clear, the record evidence suggests that Nathan Katz Realty may have decided to offer certain benefits to employees at the SIMA building, without the Board's prior approval. On the other hand, the record contains no evidence to support the Petitioner's claim that the superintendent and porter at the SIMA building also received a wage increase at that time.

Although the concepts of "single employer" and "joint employers" are sometimes confused, they are two distinct concepts. *See* Fairhaven Properties, Inc. et al., 314 NLRB 763 at n.2 (1994). As discussed above, a single employer status results when businesses which are *ostensibly* different are actually so closely integrated (with common ownership, management, etc.) that they operate, in effect, as a single entity. However, a joint employer status results when there are truly *separate* entities who nevertheless jointly determine certain employees' terms and conditions of employment. Capitol EMI Music, Inc., 311 NLRB 997 (1993).

In the instant case, the record evidence is insufficient to show SIMA Apartment Corporation to be a single employer with Nathan Katz Realty LLC and the other Katz-family companies. Although the Katz family still owns 70% of the shares in this cooperative apartment, there are also other owners such as Bruckstein who are not related to the Katz family. The Katz family controls only two of the five Board seats. Board president Bruckstein testified that decisions as to the employees, who are on SIMA's payroll, must be independently approved by the SIMA Board. Admittedly, the evidence

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143). Thus, it appears that Ceglinski's previous references to "all buildings" did not necessary include SIMA.

regarding the Board's independence from Nathan Katz Realty is not strong; it may be the reality that SIMA merely "rubber stamps" decisions made by the managing agent. Nevertheless, because of the evidence that the "non-Katz" shareholders may exercise independence in operating their cooperative apartment, I am reluctant to bind them inextricably with all of the Katz-family enterprises described above. Particularly given the differences in ownership, I find the SIMA Apartment Corporation to be a separate entity which, as a joint employer, makes joint decisions with Nathan Katz Realty regarding the employees employed at the SIMA building.

The parties stipulated that, during the past 12 months, Nathan Katz Realty LLC, in the course and conduct of its business operations, derived gross revenues in excess of $500,000, and purchased and received, at its Queens locations, goods and materials valued in excess of $5,000 directly from suppliers located outside the State of New York. Given the single-employer status of all the other Katz-family companies listed in Appendix A, it is unnecessary to find separate jurisdictional bases for each apartment-owning company. CID-SAM Management Corp. and AL-ED Management Corp., 315 NLRB 1256 (1995).

The parties also stipulated that during the past 12 months, SIMA Apartment Corporation, in the course and conduct of its business operations, derived gross revenues in excess of $500,000, and purchased and received, at its Kew Gardens location, goods and materials valued in excess of $5,000 directly from suppliers located outside the State of New York.

Based on the stipulation of the parties, and on the record as a whole, I find that the above employers are engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employers.

4. As noted above, the Intervenor and Nathan Katz Realty have signed contracts covering employees at three of the buildings managed by Nathan Katz Realty. Specifically, Int. Ex. 1 covers a superintendent employed at 43-23 40th Street in Sunnyside, Queens. A porter also works with the superintendent at that location, but does not appear to be covered by the contract. Int. Ex. 2 covers a superintendent employed at four adjoining buildings on 81st Street in Jackson Heights, Queens,[14] although for some reason the contract identifies only one address. The record indicates that two porters also work with the superintendent in those adjoining buildings. Finally, Int. Ex. 3 covers a superintendent employed at 43-08 40th Street in Sunnyside, Queens. There is no porter at that location. All three contracts are effective from November 1, 1998, to October 31, 2001.

The Intervenor argues that these contracts bar an election at this time. The Petitioner asserts that the contracts do not cover appropriate bargaining units, and therefore cannot serve as a bar. At the hearing, Nathan Katz Realty claimed that the contracts are not a bar, although it refused to state a basis. SIMA Apartment Corporation took no position on this issue, since it does not involve the SIMA building.

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[14] The four buildings were identified on the record as being owned by the following limited liability companies: 37-06 81st Street LLC, 37-30 81st Street LLC, 37-40 81st Street LLC, and Lisa Realty LLC (owner of 37-25 81st Street).

It is well established that, in order to bar an election, a contract must cover an appropriate bargaining unit. Appalachian Shale Products Co., 121 NLRB 1160 (1958). It is also well established that single-employee bargaining units are not appropriate. Roman Catholic Orphan Asylum of San Francisco, 229 NLRB 251 (1977). Moreover, even if (hypothetically) each contract covered more than one superintendent, it would doubtless be inappropriate to exclude porters from those units, given their close community of interest with the superintendents.

Accordingly, I hereby find that the contracts between the Intervenor and Nathan Katz Realty for the locations listed above do not bar an election herein, and that a question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent a single unit of all full-time and regular part-time building service employees, including superintendents and porters, employed at all the apartment buildings in Queens, New York, managed by Nathan Katz Realty, excluding all business office clerical employees, painters and other maintenance craft employees, guards and supervisors.[15] Three areas of dispute have arisen with respect to the unit. First, both Nathan Katz Realty and SIMA Apartment Corporation assert that the superintendents are supervisors as defined in Section 2(11) of the Act, and therefore must be excluded from the unit. Both the Petitioner and the Intervenor deny that the superintendents are statutory supervisors. Second, as to unit scope, the Petitioner seeks

[15] The petitioned-for unit appears as amended at the hearing. It should be noted that the petitioned-for locations do not include the Nathan Katz Realty office building in Elmhurst, or the three-family buildings managed by Nathan Katz Realty.

a single unit encompassing employees at all of the buildings managed by Nathan Katz Realty, including the SIMA building. However, both Nathan Katz Realty and SIMA assert that they are joint employers, and do not consent to have the SIMA employees included an overall unit with Nathan Katz Realty's other employees. Third, Nathan Katz Realty asserts that it would be inappropriate to combine employees at its various locations into one overall unit, the only appropriate unit being a separate unit for each location.

The Petitioner and Intervenor have indicated their willingness to proceed to an election in any unit or units found appropriate herein.

Superintendents

Ceglinski, who visits each of the 14 properties he manages approximately once per week, testified that each superintendent is "in charge" of his or her building.[16] In general, the superintendents' duties include making "basic" or minor repairs in the buildings, responding to tenants' complaints and requests, overseeing the porters' work, acting as liaisons to the managing agent (e.g., to notify them of any major repairs needed), and helping to coordinate and monitor the managing agent's maintenance craft employees or outside contractors who sometimes work in the building. In general, porters clean the buildings, such as mopping the hallways and lobbies, and removing garbage. In buildings where there is no porter, the superintendent must also perform the cleaning tasks.

Superintendents do not schedule the porters, or keep any time records or other personnel records. Rather, the Nathan Katz Realty property managers (Marcin Ceglinski and Marvin Katz) decide the porters' schedules, approve vacation requests, and must be notified when employees are out sick. If a superintendent needs help cleaning during a porter's absence, the superintendent can ask a property manager for a replacement. Ceglinski claimed that superintendents could grant time off if a porter needed to attend to personal business, but he was not aware of any specific instances of this happening.

Ceglinski testified that superintendents assign work to porters. For example, if a tenant notifies the superintendent of a spill, the superintendent may tell the porter to mop

up the spill. On cross examination, Ceglinski admitted that the porters' cleaning duties are routine, and that tenants can also directly ask the porter to clean a spill.

Both Bruckstein and Ceglinski testified that superintendents have authority to recommend hiring employees. Ceglinski stated generally that when Nathan Katz Realty needs to hire a porter for a building, it asks the superintendent if he "knows anybody." Ceglinski has also hired porters who were recommended by other employees who were not superintendents. As for the SIMA building superintendent (Andrew Mizerkowitz), Bruckstein stated that he recommended the hiring of his wife (Helen Mizerkowitz) and then his son (name unspecified) six months later. However, as discussed above in more detail, the record does not specifically indicate how these hirings came about, other than the fact that Ceglinski interviewed Mizerkowitz's son in June, and that both Nathan Katz Realty and the SIMA Board may have been involved in the decision. Ceglinski also testified that the superintendent at another building (44-08 47th Avenue) recommended hiring his wife as a porter. After Ceglinski spoke to her, and after he cleared the decision with David Levy, Ceglinski agreed to hire her. There were no other specific examples of superintendents recommending candidates for hire.

Superintendents also help to monitor the porters' work, and to correct problems when necessary. For example, when a previous porter at the SIMA building (Teddy Jackolovski) failed to clean the stairways adequately, superintendent Mizerkowitz spoke to him about it. According to Ceglinski, when Jackolovsky continued to "slack off," Mizerkowitz then asked him (Ceglinski) to speak to Jackolovsky. Ceglinski

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16 Hereinafter, generic references to superintendents will use the male pronouns, since most of the superintendents involved herein are male.

characterized the superintendent's conversation with the porter as a "verbal warning." No written record of it was placed in the porter's file.

The record indicates that superintendents have never suspended or discharged employees, nor recommended suspensions or discharge. Ceglinski testified that although superintendent Mizerkowitz could not suspend an employee for something minor like tardiness, he could suspend an employee for something serious like coming to work drunk or hitting a tenant. However, in response to a question from the Hearing Officer, Ceglinski conceded that he never told Mizerkowitz he could suspend employees. He said he just "knows" that Mizerkowitz would do that. When asked in general whether superintendents can recommend disciplining or discharging a porter, he stated: "[T]hey can, I guess, make a suggestion what to do, but the kind of action I'm taking will be my decision." There were no specific examples of such recommendations. Similarly, Ceglinski testified that if a superintendent saw other Nathan Katz Realty employees (e.g., painters) doing something "outrageous," he could tell them to leave the building, and notify the painting supervisor and property manager. No specific examples were given.

Ceglinski testified that superintendent Mizerkowitz could recommend a wage increase for a porter, either to Ceglinski or to the SIMA Board. However, he is not aware that this has ever happened.

If a porter has a complaint, such as a mistake in his paycheck, he can bring it the superintendent's attention, who would then bring it to the property manager's attention. However, there was no evidence that the superintendents have independent authority to *resolve* employees' grievances. Ceglinski stated that superintendents do not have authority to transfer a porter to another building. They do not write porters' evaluations.

There is no evidence that superintendents have authority to layoff, recall or promote employees. They can order minor supplies (e.g., light bulbs, cleaning supplies) through suppliers authorized by Nathan Katz Realty, but not major items (e.g., sinks, boilers, roofing shingles).

In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Quadrex Environmental Company, Inc., 308 NLRB 101, 102 (1992)(quoting S.Rep. No. 105, 80th Cong., 1 Sess. 4 (1947)). It has long been the Board's policy not to construe supervisory status too broadly, since a finding of supervisory status deprives individuals of important rights protected under the Act. Id. A party who seeks to exclude alleged supervisors from a bargaining unit therefore has the legal burden of proving their supervisory status. Tuscan Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989). Furthermore, to prove supervisory status under Section 2(11), the party must demonstrate not only that the individual has certain specified types of authority over employees (e.g., to assign or responsibly direct them), but also that the exercise of such authority requires the use of "independent judgment," and is not merely "routine" in nature.

In the instant case, the employers[17] have not met their burden of proving that the superintendents are supervisors as defined in the Act. At most, superintendents possess some low-level authority to assign and oversee the porters, but without using independent

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17 Here I am referring to both SIMA Apartment Corporation and Nathan Katz Realty et al.

judgment and without exercising any real supervisory authority over their employment status.

The record indicates that superintendents' assignment of work to porters -- essentially pointing out what cleaning tasks need to be done -- is routine in nature. The assignment is based on common sense considerations, such as responding to tenants' requests, which do not require the use of any independent judgment.

The record also indicates that superintendents have recommended hiring employees, such as their wives, for porter positions. Other employees who are not superintendents have also recommended candidates who were hired. It appears that the managing agent likes to recruit candidates by "word of mouth." From the specific examples given, it also appears that property manager Ceglinski interviews the candidates before making his hiring recommendation to David Levy. The evidence does not establish that the employers automatically accept the superintendents' recommendation for hiring, without conducting their own independent review. Thus, the record falls far short of proving that superintendents have supervisory authority to *effectively* recommend hiring employees.

Although Ceglinski testified that superintendents have authority to "discipline" porters, the only example given was when superintendent Mizerkowitz told Jackolovsky to clean the stairs adequately, and then reported the problem to Ceglinski. Even if this conversation could be characterized as a "verbal warning," there is no evidence that it had any independent impact on Jackolovsky's employment status. It essentially constituted a report of misconduct, with no independent effect. Under these circumstances, a "warning" does not establish any authority to discipline employees

under Section 2(11) of the Act. Panaro and Grimes, a Partnership, d/b/a Azusa Ranch Market, 321 NLRB 811, 813 (1996)(absent evidence of impact on employee's status, the mere issuance of a warning is insufficient to establish supervisory authority); Illinois Veterans Home at Anna, L.P., 323 NLRB 890 (1997).

To some extent, Ceglinski's testimony regarding the superintendents' duties was conclusionary. For example, although he said superintendents have authority to recommend wage increases, to suspend employees, and to recommend suspension and discharge, there were no specific examples given. In fact, when specifically asked about Mizerkowitz's alleged authority to suspend employees, Ceglinski conceded that he never told Mizerkowitz he had such authority. These kind of conclusionary statements, without specific and competent evidence to support them, are insufficient to establish supervisory status. Sears, Roebuck & Co., 304 NLRB 193 (1991). Thus, there is an insufficient basis for concluding that superintendents actually exercise or possess any authority to recommend rewarding, suspending or discharging employees.

Furthermore, there is no evidence that superintendents have authority to transfer, promote, layoff or recall employees, or to adjust their grievances. In short, the record contains no substantial evidence that the superintendents possess any of the supervisory powers enumerated in Section 2(11) of the Act. Finally, I note that, if superintendents were found to be supervisors, the ratio of supervisors (including approximately 24 superintendents and two property managers) to employees (approximately 21 porters) would be extremely high.

Based on the foregoing, I find that the employers have not met their burden under Tuscan Gas, supra, of proving that the superintendents are supervisors as defined in

Section 2(11) of the Act. Thus, the classifications of both superintendent and porter will be included, as the Petitioner has requested.

Unit scope

It is well established that the Board does not include employees of joint employers in a unit with other employees of one of the employers, absent employer consent. Hexacomb Corporation and Western Temporary Services, Inc., 313 NLRB 983 (1994); Greenhoot, Inc., 205 NLRB 250 (1973). Inasmuch as I have found Nathan Katz Realty and the SIMA Apartment Corporation to be joint employers, and inasmuch as they do not consent to including the jointly-employed superintendent and porter at the SIMA building in a unit with other employees of Nathan Katz Realty et al., it would be inappropriate to do so. I will therefore direct an election in a separate bargaining unit of employees at the SIMA building.

The final issue remaining is the appropriateness of one overall multi-site unit, or separate units for each site. Although Nathan Katz Realty asserted at the hearing that it would be inappropriate to combine all employees at its various Queens locations (listed in Appendix A) into one large unit, it stated no basis for that assertion. Its attorney simply stated that separate units for each location would be "the appropriate units."

It is well established that a certifiable bargaining unit need only be *an* appropriate unit, not the most appropriate unit. Morand Bros. Beverage Co., 91 NLRB 409 (1950), *enf'd* 190 F.2d 576 (7th Cir. 1951); Omni-Dunfey Hotels, Inc., d/b/a Omni International Hotel of Detroit, 283 NLRB 475 (1987); P.J. Dick Contracting, 290 NLRB 150 (1988); Dezcon, Inc., 295 NLRB 109 (1989). In this case, Nathan Katz Realty has failed to show that an overall, multi-site unit would be inappropriate. Rather, the record clearly

indicates that the superintendents and employees at all the locations are supervised by the same supervisors (i.e., the Nathan Katz Realty property managers), and that labor relations are centrally controlled at the Nathan Katz Realty office in Elmhurst (primarily by David Levy). Employees at all locations are eligible for the same vacation time and benefits. The buildings where they work are all located within the same borough -- some on the same block. Some superintendents have worked at more than one location through the years. For example, Guarry Hart worked at the 43-08 40th Street building before he transferred to the building at 98-30 67th Avenue. Furthermore, although Ceglinski testified that porters do not work in other buildings and do not substitute for each other during vacations, the record indicates other types of interchange and contact among employees at the different buildings. For example, the superintendent at 43-23 40th Street (Nicholai Dubinski) also works as a driver for Nathan Katz Realty, delivering materials to several different buildings every day. The superintendent at 33-51 73rd Street (John Ceglinski) also works as a carpenter, and has done carpentry work at all the other buildings. Similarly, other superintendents (Diego Garzon, Nicolas Avilla, Ruben Avilla) work at buildings other than their own as plumbers or carpenters. Finally, since some of the locations involved have only one employee,[18] to insist on separate units would effectively disenfranchise those single employees, for whom separate units would be inappropriate. In short, the record clearly supports the appropriateness of a multi-site bargaining unit including employees at all the buildings managed by Nathan Katz Realty et al., as the Petitioner has requested and as indicated in Appendix A.

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18 The following locations were identified as having only one superintendent, but no porter: 32-06 47th Street; 43-08 40th Street; the three-entrance building owned by Katz and Levy LLC on 62nd Street; 35-16 34th Street; and 119-21 Metropolitan Avenue.

Accordingly, I hereby find that the following two separate units of employees constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

MULTI-SITE UNIT FOR NATHAN KATZ REALTY ET AL.

> All full-time and regular part-time building service employees, including superintendents and porters, employed by Nathan Katz Realty LLC and the other companies listed in Appendix A, at the various apartment buildings listed in Appendix A, but excluding all business office clerical employees, maintenance craft employees, guards and supervisors as defined in the Act.

SINGLE-SITE UNIT FOR SIMA APARTMENT CORP.

> All full-time and regular part-time building service employees, including superintendents and porters, employed by SIMA Apartment Corp. and Nathan Katz Realty LLC, as joint employers, at their 83-30 118th Street, Kew Gardens, New York facility, but excluding all business office clerical employees, maintenance craft employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since

the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. In the multi-site unit, those eligible shall vote whether they desire to be represented for collective bargaining purposes by Local 32B-32J, Service Employees International Union, AFL-CIO, or by the Factory and Building Employees Union, Local 187, or by neither labor organization. In the single-site unit involving SIMA Apartment Corp., those eligible shall vote whether they desire to be represented for collective bargaining purposes by Local 32B-32J, Service Employees International Union, AFL-CIO.[19]

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of election eligibility lists for the two separate units referred to above, containing the full names and addresses of all the eligible voters, shall be filed by the Employers with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such lists must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before July 8, 1999. No extension of time to file the lists may be granted, nor shall the filing of a request for review operate to stay the filing

[19] The Intervenor has not submitted a showing of interest for the SIMA unit, at this point in time. If the Intervenor submits a showing of interest for this unit within ten (10) days of the issuance of this Decision, its name will be put on the ballot for the SIMA unit as well.

of such lists except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employers at least three working days prior to an election. If the Employers have not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employers to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by July 15, 1999.

Dated at Brooklyn, New York, this 1st day of July, 1999.

_____
Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

393-6068-4000

177-1642
177-1650

347-4040-3333

177-8560-1500, -4000, -7000, -8000, -9000

440-5001
440-5033-6020

440-3301, -3325, -3350 et seq.

APPENDIX A

The following corporations are included as the Employer's name in the petition, as amended, and have been found herein to constitute a single employer:

Nathan Katz Realty LLC
37-06 81st Street LLC
37-30 81st Street LLC
37-40 81st Street LLC
Lisa Realty LLC (owner of 37-25 81st Street building)
33-51 73rd Street LLC
41-26 73rd Street LLC
32-06 47th Street LLC
34-10 84th Street LLC
34-15 Parsons Boulevard LLC
47-06 46th Street LLC
47-05 45th Street LLC
43-09 47th Avenue LLC
Sunnywood Management Corp. (owner of 47-05 44th Street, 47-06 45th Street, 44-08 47th Avenue and 44-14 47th Avenue)
99-60/65 64th Street LLC (owner of 99-60 64th Avenue and 99-65 64th Road)
Rebecca Realty LLC (owner of 88-36 Elmhurst Avenue)
Michelle Realty LLC (owner of 41-25 Case Street)
Miriam Realty LLC (owner of 43-23 40th Street)
RKL Realty LLC (owner of 43-08 40th Street)
37-37 88th Street LLC
188-30/34 87th Drive LLC
Katz and Levy LLC (owner of 39-11 62nd Street, 39-15 62nd Street, and 39-19 62nd Street)
NRM Realty LLC (owner of 35-65 86th Street)
35-16 34th Street LLC
83-40 Britton Avenue LLC
119-21 Metropolitan Avenue LLC
34-09 83rd Street LLC
98-30 67th Avenue LLC
32-42 33rd Street LLC
32-52 33rd Street LLC

Note: This does not include SIMA Apartment Corp. (owner of the 83-30 118th Street building in Kew Gardens), which was found not to be a single employer with the above entities.

APPENDIX A

APPENDIX B

The record is hereby amended as follows:

All cover sheets and captions should indicate Case No. 29-RC-926**5**, rather than No. 29-RC-926**7**.

Page 7, line 23 et seq.: The address "4133 75th Street" should be punctuated as "41-33 75th Street". **All references to the Employer's addresses in the borough of Queens should have a hyphen before the last two digits**.

Page 27, line 25 et seq.: All references to "Cue" Gardens should be spelled "Kew" Gardens.

Page 31, line 20 et seq.: All references to the companies' "principles" should be spelled "principals".

Page 47, lines 18 and 30: "Marcin" rather than "Marshan".

Page 48, line 1 et seq.: All references to Section "211" should be punctuated as "2(11)".

Page 109, lines 5 and 7: "Kew" Gardens, rather than "Hugh" Gardens.

Page 117, line 10: "sick" days, rather than "six" days.

Page 126, line 19: "action" rather than "option".

APPENDIX B